

in Mexico to X Corporation's United States office for the purpose of engaging in his employment with X Corporation. B returned to his residence in Mexico on each of those evenings. On seven days in the period from February 1, 1988, through June 1, 1988, B worked in X's Mexico office. B is not considered to have been present in the United States on any of the days that he travelled to X's United States office for the purpose of engaging in employment with Corporation X because he commuted to his place of employment within the United States on more than 75% of the workdays during the working period (59 workdays in the United States/66 workdays in the working period=89.4%).

Example 2. C, who lives in Canada, contracted with a resort located in the United States to provide snow-skiing instructions for the resort's customers for two skiing seasons, the first beginning on November 15, 1987, and ending on March 15, 1988, and the second beginning on November 15, 1988, and ending on March 15, 1989. On 90 days in each of the two skiing seasons, C travelled in the morning from Canada to the resort to provide skiing instructions pursuant to the contract. C returned to Canada on each of those evenings. On 20 days during each of the two skiing seasons, C worked in Canada. C is not considered to have been present in the United States on any of the days that she travelled to the United States to provide ski instructions in either the first working period beginning on November 15, 1987, and ending on March 15, 1988, or the second working period beginning on November 15, 1988, and ending on March 15, 1989, because she commuted to her employment within the United States on more than 75% of the workdays during each of the working periods (90 workdays in the United States/110 workdays in the working period=81.8%).

Example 3. D, who lives in Canada, is the sole proprietor of a wholesale lumber business with offices in both the United States and Canada. Beginning on January 4, 1988, and ending on February 12, 1988, D commuted to work in his United States office on 30 days. Beginning on February 15, 1988, and ending on March 25, 1988, D commuted to work in his Canadian office on 30 days. Beginning on March 28, 1988, and ending on May 27, 1988, D commuted to work in his United States office on 45 days. Subsequent to May 27, D did not commute to the United States on any other days in 1988. D is considered to have been present in the United States on each day that he travelled to his office in the United States because D did not commute to the United States office on more than 75% of the workdays during the working period beginning on January 4, 1988, and ending on May 27, 1988 (75 workdays in the United States/105 workdays in the working period=71.4%).

(f) *Determination of excluded days applies beyond year of determination.* If a day of presence is excluded under this section, then that day shall not be taken into account in the current year or the first or second preceding year.

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§ 301.7701(b)-4 Residency time periods.

(a) *First year of residency.* An alien individual who was not a United States resident during the preceding calendar year and who is a United States resident for the current year will begin to be a resident for tax purposes on the alien's residency starting date. The residency starting date for an alien who meets the substantial presence test is the first day during the calendar year on which the individual is present in the United States. The residency starting date for an alien who meets the lawful permanent resident test (green card test), described in paragraph (b)(1) of § 301.7701(b)-1, is the first day during the calendar year in which the individual is physically present in the United States as a lawful permanent resident. The residency starting date for an alien who satisfies both the substantial presence test and the green card test will be the earlier of the first day the individual is physically present in the United States as a lawful permanent resident of the United States or the first day during the year that the individual is present for purposes of the substantial presence test. (See § 301.7701(b)-9(b)(1) for the transitional rule relating to the residency starting date of an alien individual who was a lawful permanent resident in 1984. See also § 301.7701(b)-3 for days that may be excluded.)

(b) *Last year of residency—(1) General rule.* An alien individual who is a United States resident during the current year but who is not a United States resident at any time during the following calendar year will cease to be a resident for tax purposes on the individual's residency termination date. Generally, the residency termination date will be the last day of the calendar year.

(2) *Exceptions.* Notwithstanding paragraph (b)(1) of this section, the residency termination date for an alien individual who meets the substantial presence test is the last day during the calendar year that the individual is physically present in the United States if the individual establishes that, for the remainder of the calendar year, the individual's tax home was in a foreign country and he or she maintained a closer connection (within the meaning of § 301.7701(b)-2(d)) to that foreign country than to the United States. Similarly, the residency termination date for an alien who meets the green card test is the first day during the calendar year that the alien is no longer a lawful permanent resident if the individual establishes that, for the remainder of the calendar year, his or her tax home was in a foreign country and he or she maintained a closer connection to that foreign country than to the United States. The residency termination date for an alien who satisfies both the substantial presence test and the green card test for the current year, will be the later of the first day the individual is no longer a lawful permanent resident of the United States or the last day the individual was physically present in the United States if the alien establishes that, for the remainder of the calendar year, his or her tax home was in a foreign country and he or she maintained a closer connection to that foreign country than to the United States. It is immaterial whether the individual's tax home was in the United States, or that the individual had a closer connection to the United States than to the foreign country, prior to the date of his or her departure from the United States or the date on which the individual was no longer a lawful permanent resident, whichever is applicable.

(c) *Rules relating to residency starting date and residency termination date—(1) De minimis presence.* An alien individual may be present in the United States for up to 10 days without triggering the residency starting date (for purposes of the substantial presence test) or extending the residency termination date (for purposes of the substantial presence test) if the individual is able to establish that, during that period, the

individual's tax home was in a foreign country and he or she maintained a closer connection to that foreign country than to the United States. Days from more than one period of presence may be disregarded for purposes of determining an individual's residency starting date or termination date so long as the total is not more than 10 days. However, an individual may not disregard any days that occur in a period of consecutive days of presence, if all the days that occur during that period cannot be excluded. An individual must include days of presence for purposes of determining whether the individual meets the substantial presence test even though the days may be disregarded for purposes of determining the individual's residency starting date or residency termination date.

(2) *Proration.* If an individual's residency starting date does not fall on the first day of the tax year, or the individual's residency termination date does not fall on the last day of the tax year, the individual's income tax liability should be calculated in accordance with § 1.871-13 of this chapter dealing with the taxation of individuals who change residence status during the taxable year.

(3) *Residency starting date for certain individuals—(i) In general.* If an alien individual (who otherwise does not meet the substantial presence test or the green card test for the current year) is physically present in the United States for at least 31 consecutive days during the current year, and also for a period of continuous presence beginning with the first day of that thirty-one day period (see paragraph (c)(3)(iii) of this section), then the individual may elect to be treated as a resident during the current year. The individual's residency starting date shall be the first day of that thirty-one day period, if—

(A) The individual was not a resident of the United States under the substantial presence test or the green card test in the year preceding the current year; and

(B) The individual is a resident of the United States in the subsequent year under the substantial presence test (whether or not the individual is also a resident of the United States under the green card test).

(ii) *Determination of presence.* Except as otherwise provided in paragraph (c)(3)(iii) of this section, an individual shall be treated as present in the United States on any day that the individual is physically present in the United States at any time during the day.

(iii) *Thirty-one day period.* For purposes of this paragraph (c)(3), the term *thirty-one day period* means any period of 31 consecutive days during which an individual is physically present in the United States during each day of the period.

(iv) *Period of continuous presence.* For purposes of this paragraph (c)(3), the term *continuous presence* means a period of presence in the United States that includes 75 percent of the days in the current year beginning with (and including) the first day of the individual's thirty-one day period of presence. Only for purposes of the continuous presence requirement, an individual will be deemed to be present in the United States for up to 5 days on which the individual is absent from the United States. These days will not be deemed to be days of presence for purposes of the thirty-one day period of presence requirement. If an individual is present for more than one thirty-one day period of presence and satisfies the continuous presence requirement with regard to each period, the individual's residency starting date shall be the first day of the first thirty-one day period of presence. If an individual is present for more than one thirty-one day period of presence but satisfies the continuous presence requirement only for a later thirty-one day period, the individual's residency starting date shall be the first day of the later thirty-one day period of presence. For purposes of this paragraph (c)(3), days of presence that are otherwise excluded under section 7701(b)(3)(D)(i) and § 301.7701(b)-3(a)(1) (exempt individual), (a)(2) (medical condition), (a)(3) (in transit between two foreign points), and (a)(4) (regular commuter) shall not be counted as days of presence for purposes of either the thirty-one day period or continuous presence requirement.

(v) *Election procedure*—(A) *Filing requirements.* An alien individual shall

make an election to be treated as a resident under paragraph (c)(3) of this section by attaching a statement (described in paragraph (c)(3)(v)(C) of this section) to the individual's income tax return (Form 1040) for the taxable year for which the election is to be in effect (the election year). The alien individual may not make this election until such time as he has satisfied the substantial presence test for the year following the election year. If an alien individual has not satisfied the substantial presence test for the year following the election year as of the due date (not including extensions) of the tax return for the election year, the alien individual may request an extension of time for filing the return until a reasonable period after he or she has satisfied such test, provided that the individual pays with his or her extension application the amount of tax he or she expects to owe for the election year computed as if he or she were a nonresident alien throughout the election year. An election made under paragraph (c)(3) of this section may not be revoked without the approval of the Commissioner or his delegate.

(B) *Election on behalf of a dependent child.* An individual may make an election on behalf of a dependent child (as defined in paragraphs (1) and (2) of section 152(a), without regard to section 152(b)(3)) if the individual is qualified to make an election on his or her own behalf, the child qualifies to make an election under this paragraph (c)(3), and the child is not required by section 6012 to file a United States income tax return for the year for which the election is to be effective.

(C) *Statement.* The statement required by paragraph (c)(3)(v)(A) of this section shall include the name and address of the alien individual and contain a signed declaration that the election is being made. If the individual is also making an election on behalf of any dependent children, then the statement must include the required information with respect to those children. The statement must specify—

(1) That the alien individual was not a resident in the year immediately preceding the election year;

(2) That the alien individual is a resident under the substantial presence

test in the year following the election year;

(3) The individual's number of days of presence in the United States during the year following the election year;

(4) The date or dates of the alien individual's thirty-one day period of presence and period of continuous presence in the United States during the election year; and

(5) The date or dates of absence from the United States during the election year that are deemed to be days of presence.

(vi) *Penalty for failure to comply with filing requirements*—(A) *General rule*. If an individual fails to comply with the election procedure of paragraph (c)(3)(v) of this section, the individual must file his or her income tax return for the current year as a nonresident alien.

(B) *Exception*. The penalty described in paragraph (c)(3)(vi)(A) of this section shall not apply if the individual can show by clear and convincing evidence that he or she took reasonable actions to become aware of the filing requirements and significant affirmative steps to comply with the requirements. An individual who requests an extension of time to file his or her income tax return pursuant to paragraph (c)(3)(v) of this section will be considered to have taken significant affirmative steps to comply with the requirement that the individual pay his or her tax determined as if the individual were a nonresident alien if the individual paid with his or her extension application at least 90 percent of the amount of the tax the individual actually owed for the election year computed as if he or she were a nonresident alien throughout the election year.

(d) *Examples*. The following examples illustrate the operation of this section:

Example 1. B, a citizen of foreign country X, is an alien who has never before been a United States resident for tax purposes. B comes to the United States on January 6, 1985, to attend a business meeting and returns to country X on January 10, 1985. B is able to establish a closer connection to country X for the period January 6-10. On March 1, 1985, B moves to the United States and resides here until August 20, 1985, when he returns to country X. On December 12, 1985, B comes to the United States for pleasure and stays here until December 16, 1985 when he

returns to country X. B is able to establish a closer connection to country X for the period December 12-16. B is not a United States resident for tax purposes during the following year and can establish a closer connection to country X for the remainder of calendar year 1985. B is a resident of the United States under the substantial presence test because B is present in the United States for 183 days (5 days in January plus 173 days for the period March 1-August 20 plus 5 days in December). B's residency starting date is March 1, 1985, and his residency termination date is August 20, 1985.

Example 2. The facts are the same as in *Example 1*, except that B remains in the United States until December 17, 1985, and is able to establish a closer connection to country X for the period December 18 through 31. B's residency termination date is December 17, 1985.

Example 3. C, a citizen of foreign country Y, is an alien who has never before been a United States resident for tax purposes. C comes to the United States for the first time on February 10, 1985, and attends a business conference until February 24, 1985, when she returns to country Y. On April 20, 1985, C enters the United States as a lawful permanent resident. On November 10, 1985, C ceases to be a lawful permanent resident but stays on in the United States until November 20, 1985 when she returns to country Y. On December 8, 1985, C comes to the United States and stays here until December 17, 1985 when she returns to country Y. She can establish a closer connection to country Y for that period. C is not a resident of the United States during the following calendar year and can establish a closer connection to country Y for the remainder of calendar year 1985. C qualifies as a United States resident under both the green card test and the substantial presence test. C's residency starting date under the green card test is April 20, 1985. Under the substantial presence test, C's residency starting date is February 10, 1985, because she is present for more than ten days in February and cannot take advantage of the de minimis presence rule. Therefore, C's residency starting date is February 10, 1985. C's residency termination date under the green card test is November 10, 1985. Her residency termination date under the substantial presence test is November 20, 1985, because B can disregard ten days of presence in December. Thus, her residency termination date is November 20, 1985, the later of her residency termination date under the substantial presence test or the green card test.

Example 4. The facts are the same as in *Example 3*, except that C is initially present in the United States on business from February 5 to February 9, 1985. C is able to establish a closer connection to country Y for that period. C may take advantage of only ten days of de minimis presence and may exclude days

from a continuous period of presence only if she can exclude all the days that occur during that period. Thus, C may choose either of the following periods of residency: residency starting date February 5, 1985, and residency termination date November 20, 1985, or residency starting date April 20, 1985, and residency termination date December 17, 1985.

Example 5. D, a citizen of foreign country Z, is an alien who has never before been a United States resident for tax purposes. D comes to the United States on November 1, 1985 and is present in the United States on 31 consecutive days (from November 1 through December 1, 1985). D returns to country Z on December 1 and does not come back to the United States until December 17, 1985. He remains in the United States for the rest of the year. During 1986, D is a resident of the United States under the substantial presence test. D may elect to be treated as a resident of the United States for 1985 because he was present in the United States in 1985 for a 31 consecutive day period of presence (November 1 through December 1, 1985) and for at least 75 percent of the days following (and including) the first day of D's 31 consecutive day period of presence (46 total days of presence in the United States/61 days in the period from November 1 through December 31=75.4%). If D makes the election to be treated as a resident, his residency starting date will be November 1, 1985.

Example 6. The facts are the same as in *Example 5*, except that D is absent from the United States on December 24, 25, 29, 30 and 31. D may make the election to be treated as a resident for 1985 because up to five days of absence will be deemed to be days of presence for purposes of the continuous presence requirement.

Example 7. F, a citizen of foreign country M, is an alien individual who has never before been a United States resident for tax purposes. F comes to the United States on January 1, 1985 and remains in the United States through January 31, 1985, when she returns to country M. F comes back to the United States on October 1, 1985 and is present in the United States through November 1, 1985. From November 1, 1985 through December 31, 1985, F is present in the United States for 38 days. Although F satisfies two 31 consecutive day periods of presence, (January 1 through January 31 and October 1 through November 1), she satisfies the continuous presence requirement only with regard to the later period of presence (69 total days of presence/92 days in the period from October 1 through December 31=75%). Thus, if F makes the election to be treated as a resident, his residency starting date is October 1, 1985.

(e) *No lapse*—(1) *Residency in prior year.* An alien individual who was a United States resident during any part

of the preceding calendar year and who is a United States resident for any part of the current year will be considered to be taxable as a resident at the beginning of the current year. For purposes of this paragraph (e)(1), it is immaterial whether an individual is considered to be a resident under the substantial presence test or the green card test.

(2) *Residency in following year.* An alien individual who is a United States resident for any part of the current year and who is also a United States resident for any part of the following year (regardless of whether the individual has a closer connection to a foreign country than the United States during the current year) will be taxable as a resident through the end of the current year. For purposes of this paragraph (e)(2), it is immaterial whether an individual is considered to be a resident under the substantial presence test or the green card test.

(3) *Special rule.* If an individual meets the green card test for the current year but is not physically present in the United States during the current year, then the individual's residency starting date shall be the first day of the following year.

(4) *Example.* The following example illustrates the application of this paragraph (e).

Example. B, an alien individual who is a citizen of foreign country M, comes to the United States for the first time on May 1, 1985, and remains in the United States until November 5, 1985, when he returns to country M. B comes back to the United States on March 5, 1986 as a lawful permanent resident and remains in the United States until September 10, 1986, when he ceases to be a lawful permanent resident and returns to country M. B is not a resident in calendar year 1987. B's United States residency in calendar year 1985 continues through December 31, 1985, because he is a United States resident in the following calendar year. In calendar year 1986, B's United States residency is deemed to begin on January 1, 1986 because B qualified as a resident in the preceding calendar year. Thus, B's residency period in the United States begins on May 1, 1985, and ends on September 10, 1986.

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